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In the Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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A pipeline owned and operated by petitioner unlawfully discharged approximately 5,200 gallons of gasoline into the waters of the United States (Pet. App. C-2). Petitioner was not at fault; the discharge was caused by an unknown third party (*id.* at C-2 to C-3). Section 311(b)(6) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. 1321(b)(6), authorized the government to impose a civil penalty of up to $5,000 on petitioner in these circumstances, and the government exacted a penalty of $1,000. Petitioner asserts that Section 311(b)(6) is unconstitutional as so applied.

1. The discharge occurred in June 1977 (Pet. App. C-2). At that time,[1] Section 311(b)(6) provided that the "owner or operator of [the] * * * facility from which oil or a hazardous substance is discharged in violation of [33 U.S.C. 1321(b)](3) * * * shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. * * * In determining the amount of the penalty, * * * the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary." As this Court noted in *United States* v. *Ward*, 448 U.S. 242 (1980), where it held that a proceeding to assess a civil penalty under Section 311(b)(6) is not a "criminal case" for purposes of the Fifth Amendment's Self-Incrimination Clause, the penalties collected under Section 311 are paid not into the Treasury generally but into a fund "used to finance the [costs of] removal, containment, and dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the [FWPCA]" (448 U.S. at 246; see 33 U.S.C. 1321(k), (*l*)).

The discharge in this case violated 33 U.S.C. 1321(b)(3), and Section 311 permits the penalty to be imposed even if the owner of the facility is not at fault.[2] Accordingly, the Coast Guard assessed a penalty of $1,000 against petitioner, noting that "the gravity of the violation was quite severe

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[1]Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467. The discharge at issue here occurred prior to both amendments; the changes are not material to the issue presented here. Section 311(b)(6) is now found at 33 U.S.C. (Supp. III) 1321(b)(6)(A).

[2]Petitioner concedes both the violation (Pet. App. B-4) and the resulting statutory liability (Pet. 7).

even though [petitioner's] fault may have been minimal. In other circumstances, the maximum penalty for such a large spill would have been proper" (Pet. App. A-5 to A-6).

Petitioner refused to pay the assessment and the government sued to enforce it in the United States District Court for the Southern District of Texas. The district court rejected petitioner's constitutional claim and enforced the penalty,[3] noting (Pet. App. B-4 to B-5):

> The civil penalty has certain, non-deterrent, economic purposes which are rationally served by an absolute liability standard. The penalties collected * * * go into a revolving fund maintained by the government to defray the costs of administration and cleaning up oil spills in situations where the clean-up costs are otherwise not recoverable—where spills are unreported, caused by acts of God, or committed by financially insolvent persons.

The court of appeals affirmed, relying in part on *United States* v. *Marathon Pipe Line Co.*, 589 F. 2d 1305 (7th Cir. 1978). It said that the purpose of the statute was to "place[] a major part of the financial burden for achieving and maintaining clean water upon those who would profit by the use of our navigable waters and adjacent areas * * *. We find this shifting of the burden from the public to the offending users—albeit good faith, non-negligent users—to be a valid exercise of congressional powers" (Pet. App. C-5).

2. Petitioner contends (*e.g.*, Pet. 8-9) that Section 311 violates the Due Process Clause of the Fifth Amendment because it permits a penalty to be imposed on petitioner even though another party caused the discharge. Petitioner

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[3]Apparently because of a clerical error in the government's complaint (see Pet. App. C-6), the district court fixed the penalty at $5,000. On the government's motion (Pet. 16), the court of appeals reduced the penalty to $1,000 (Pet. App. C-5 to C-6).

recognizes that a statute ordinarily does not violate the Due Process Clause if it "ha[s] a reasonable relation to a proper legislative purpose and * * * [is] neither * * * arbitrary nor discriminatory" (Pet. 14; see *id.* at 8-9, citing *Nebbia* v. *New York*, 291 U.S. 502 (1934); see *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-125 (1978)). But petitioner asserts that the application of the Section 311(b)(6) civil penalty provision to it in the circumstances of this case was arbitary and bore no relation to any legitimate congressional objective (Pet. 13).

This assertion is without merit. Petitioner could not possibly protest if Congress charged all owners of underwater pipelines a fee in order to defray the expenses of administering an anti-pollution program and of cleaning up after accidents for which no one could be held accountable. Such user fees are familiar in other areas and would undoubtedly be constitutional here; among other things, they would reflect a congressional judgment that the clean-up and administrative expenses should be borne not by the taxpayers generally but by those who profit from the enterprises that give rise to those expenses.

Here, by imposing that fee only on owners whose facilities discharge oil unlawfully, Congress has provided an added incentive for owners to take every possible precaution against such discharges. If a fee were imposed only on negligent polluters, for example, there would be little incentive for owners to take precautions beyond simply avoiding negligence—precautions that Congress could rationally want owners to take; and some owners might be tempted to be careless in the hope that they could later convince a factfinder that they were not. Moreover, by making liable all owners of facilities which discharge oil, Congress has avoided time-consuming inquiries into fault. Thus Section 311(b) serves many of the same purposes as a strict liability recovery in tort law—which can also be exacted from a

party who "did all that reasonably could have been expected to prevent" the damage that results from its activity (Pet. 13)—and it would be wholly implausible to suggest that strict liability doctrines are unconstitutional.

Petitioner contends that the Section 311(b)(6) penalty is a "forfeiture" (*e.g.*, Pet. 5-6) and, as such, is unconstitutional under *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The remark in *Calero-Toledo* on which petitioner relies is, of course, dictum, for in that case the Court upheld the forfeiture of a yacht used for an unlawful purpose even though the owner "was neither involved in nor aware of the act * * * which resulted in the forfeiture" (*id.* at 664). In commenting that if an owner had taken every precaution to prevent the unlawful use of his property, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive" (*id.* at 689-690), the Court was plainly concerned with the distinctive aspect of a forfeiture penalty—that it "ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law" (*United States* v. *Ward, supra*, 448 U.S. at 254). In a case dealing with Section 311(b)(6), this Court has held that it is precisely this aspect of a forfeiture that the Section 311(b)(6) civil penalty does *not* possess. 448 U.S. at 254. "[T]he [Section 311(b)(6)] penalty is much more analogous to traditional civil damages" (*ibid.*) than to a forfeiture. Not only is the amount of the penalty relatively small, as petitioner recognizes (see Pet. 16), but Section 311(b)(6) specifically instructs the authorities to consider "the gravity of the violation" and "the appropriateness of [the] penalty to the size of the business of the owner or operator charged [and] the effect on the owner or operator's ability to continue in business * * *." Thus Section 311(b)(6) is specifically designed to prevent a penalty from being excessively harsh or "unduly oppressive." Moreover, petitioner does not contend that the penalty imposed in this case is in fact oppressive.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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